NO. 83-6231

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

JAMES RONALD MEANES,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT DENIED PETITIONER DUE PROCESS OF LAW BY ITS INSTRUCTIONS TO THE JURY AT THE PUNISHMENT PHASE OF TRIAL?

II. WHETHER THE TEXAS CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL AS APPLIED TO THIS CASE?

III. WHETHER THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR IN FAILING TO DEFINE "MURDER" AND "CAPITAL MURDER" AT THE GUILT/INNOCENCE PHASE OF TRIAL?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals of Texas, which is not yet published, is reproduced in Appendix A to the Petition for Writ of Certiorari. The Texas Court of Criminal Appeals denied the Motion for Leave to File Petitioner's Motion for Rehearing on November 9, 1983.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner bases his claims upon the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The record reflects that Petitioner was indicted on April 22, 1981, in Harris County, Texas, for the murder of Olivero Flores while in the course of committing and attempting to commit robbery. Trial began on July 20, 1981, and on July 22, 1981, the jury found Petitioner guilty of the offense of capital murder. On July 23, 1981, after a punishment hearing, the jury answered affirmatively the special issues submitted pursuant to Article 37.071, Tex. Code Crim. Proc. Ann. (Vernon). Accordingly, punishment was assessed at death. Petitioner appealed his conviction and sentence to the Texas Court of Criminal Appeals, which on September 14, 1983 affirmed the conviction and sentence. Rehearing was denied on November 9, 1983.

STATEMENT OF FACTS

The relevant facts are set out in the opinion of the Texas Court of Criminal Appeals, attached s Appendix A to the Petition for Writ of Certiorari. The court's charge to the jury at the punishment phase of the trial is attached as Appendix A to Respondent's Brief in Opposition.

SUMMARY OF ARGUMENT

There are no special or important reasons to review this case. The issues presented involve only the application of well-settled constitutional principles to the facts involved herein. This Court is without jurisdiction to consider Petitioner's claims that he was denied due process because the trial court refused to instruct on a lesser-included offense and failed to define "deliberately" at the punishment trial as such claims were not presented to and decided by the court below. Petitioner's Motion for Leave to File Appellant's Motion for Rehearing, which was denied by the Texas Court of Criminal Appeals without written order, is insufficient to afford the

state appellate court an opportunity to decide the merits of the claims.

Petitioner was not denied due process by the trial court's instructions to the jury at the punishment phase of the trial. The instructions on their face require the jury to find beyond a reasonable doubt that Petitioner's conduct which caused the victim's death was committed deliberately and with reasonable expectation that death would result. Petitioner's argument that the Constitution requires the trial court to guide the jury's consideration of aggravating and mitigating circumstances at the punishment phase of a capital murder trial was decided by this Court in Jurek v. Texas, 428 U.S. 262 (1976) and reaffirmed in Zant v. Stephens, __ U.S. __, 103 S.Ct. 2733 (1983). Further, Jurek settled the question of whether the Texas capital sentencing statute is unconstitutional because it precludes the jury from considering mitigating evidence.

Finally, Petitioner's claim that the trial court committed constitutional error in failing to define "murder" and "capital murder" at the guilt/innocence phase of trial involves nothing more than factual determinations made by the state trial and appellate courts below after careful consideration of Petitioner's claim. His reliance on Beck v. Alabama, 477 U.S. 625 (1980) is misplaced. The record clearly reflects that no request for an instruction on a lesser-included offense was made by Petitioner.

REASONS FOR DENYING THE WRIT

I. THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reason in this case and none exists. Further, this case presents only the question whether well-settled constitutional principles were correctly applied to

the facts of this case. THus, no important question of law is presented herein.

II. THIS COURT IS WITHOUT JURISDICTION TO CONSIDER PETITIONER'S CLAIMS THAT HE WAS DENIED DUE PROCESS BECAUSE THE TRIAL COURT REFUSED TO INSTRUCT ON A LESSER-INCLUDED OFFENSE AND FAILED TO DEFINE "DELIBERATELY" AT THE PUNISHMENT TRIAL AS SUCH CLAIMS HAVE NOT BEEN PRESENTED TO THE TEXAS COURT OF CRIMINAL APPEALS.

The cases are legion that this Court will not decide issues raised for the first time on petition for writ of certiorari or on appeal, and that the Court will not decide federal questions not raised and decided in the court below. E.g., Illinois v. Gates, 103 S.Ct. 2317, 2321-23 (1983); Tacon v. Arizona, 410 U.S. 351, 352 (1973); Hill v. California, 401 U.S. 797, 805-06 (1971); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long-standing nature of the rule: "[I]n Crowell v. Randell, 10 Pet. 268 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, 20, Section 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." Cardinale v. Louisiana, 394 U.S. at 439. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the state proceedings, but that it be raised at the proper point. Beck v. Washington, 369 U.S. 541, 550 (1962); Godchaux Co., Inc. v. Estopinal, 251 U.S. 179, 181 (1919).

Though not entitled as such, Petitioner claims under subsection III that he was denied due process by the trial court's failure to instruct the jury on a lesser included offense. (Petition for Writ of Certiorari at 12-14). At trial, Petitioner objected to the charge on the basis that "the Court neglected to put in the definition of murder and capital murder, only the offense of robbery is defined. We ask that be done"

(SF Vol. IX 447). No request was made that the court give the jury a lesser included offense instruction. On direct appeal, Petitioner raised only the claim that the trial court erred in failing to include a definition of murder and capital murder. Thus, Petitioner's claim that the trial court committed fundamental error in failing to give the jury a lesser included offense instruction was not adequately presented to the court below.

Petitioner alleged in his "Motion for Leave to File Appellant's Motion for Rehearing" that the Texas Court of Criminal Appeals erred in failing to reconcile this case with Beck v. Alabama, 477 U.S. 625 (1980) and Hopper v. Evans, 465 U.S. 60 (1982). Leave to file, however, was denied by the Texas Court of Criminal Appeals without written order. Respondent submits that Petitioner's claim raised under subsection III has thus, not been passed on and decided by the court below.

Further, under subsection II, Petitioner claims, in effect, that the trial court committed constitutional error in failing to define "deliberately" at the punishment phase. (Petition for Writ of Certiorari at 11). Respondent submits that this claim has never been presented to the court below and has never been decided on the merits. Again, his presenting this claim on Motion for Leave to File Appellant's Motion for Rehearing is insufficient to afford the court below an opportunity to reach the merits of this claim. In view of Petitioner's failure to properly present these issues and the desirability of giving the state courts the first opportunity to address these issues, the application for writ of certiorari should be denied for want of jurisdiction. Cardinale v. Louisiana, 394 U.S. at 439.

III. PETITIONER WAS NOT DENIED DUE PROCESS BY THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AT THE PUNISHMENT PHASE OF TRIAL.

The record reflects that at the punishment phase of the trial Petitioner was instructed in accordance with Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon). (See Appendix A to Respondent's Brief in Opposition). It further reflects that the jury answered special issues No. 1 and 2 in the affirmative (Tr. Vol. I 42-53; SF Vol. XIV 55-56). Thus, the record affirmatively reflects that the jury was not charged with the law of parties at the punishment phase. The instructions on their face require the jury to find beyond a reasonable doubt that Petitioner's conduct which caused the victim's death was committed deliberately and with reasonable expectation that the victim's death would result. See Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983). The record reflects that no request was made for a special instruction "that the Texas law of a party's criminal responsibility for the act of another did not supply the accused's deliberate intent and reasonable expectation that death would result" and that no objection to the charge at punishment was made. (See SF Vol. XI, XII).

Apparently, Petitioner is arguing that the Constitution requires the trial court to guide the jury's consideration of aggravating and mitigating circumstances at the punishment phase of a capital murder trial. In Zant v. Stephens, __ U.S. __, 103 S.Ct. 2733, 1742 n.13 (1983), this Court reiterated its position in Jurek v. Texas, 428 U.S. 262 (1976) that specific standards for balancing aggravating against mitigating circumstances are not constitutionally required. The Court again recognized that in Texas the jury's discretion is channeled by the narrowing categories of murders for which the death sentence may be imposed. Respondent submits that Petitioner's claim of constitutional error is meritless. Further, in Jurek, this Court held that the second Texas statutory question concerning "whether there is a probability that the defendant would commit criminal

acts of violence that would constitute a continuing threat to society" operates as to allow a defendant to bring forth whatever mitigating circumstances he may be able to show." 428 U.S. 274-75. Petitioner's claim that the statute is unconstitutional because it precludes the jury from considering mitigating evidence is without merit.

IV. THE STATE COURT DID NOT COMMIT ERROR OF CONSTITUTIONAL MAGNITUDE IN REFUSING PETITIONER'S REQUESTED JURY INSTRUCTION.

Petitioner contends that the trial court committed constitutional error in failing to define "capital murder" and "murder" at the guilt/innocence phase of trial. The Texas Court of Criminal Appeals found that "capital murder" was, in effect, defined in the paragraph applying the law to the facts of the case and, that the application paragraph required the jury to find all of the constituent elements of murder. Meanes v. State, No. 68,901, Slip Opinion at 13-14. (See Petition for Writ of Certiorari, Appendix A at 13-14). The issue thus involves nothing more than factual determinations made by the state trial and appellate courts below after careful consideration of Petitioner's claims.

Petitioner's reliance on Beck v. Alabama, supra, in support of his claim that the trial court committed fundamental error in refusing to give the jury a lesser included instruction is misplaced. In Beck, a state statute prohibited the trial judge from giving the jury the option of convicting as to the lesser-included offense. No such statutory prohibition exists in Texas. See Tex. Code Crim. Proc. Ann. art. 37.08 (Vernon). Petitioner does not argue that such prohibition exists in Texas, but rather that the trial court refused his request for a lesser included offense instruction. His claim is not supported by the record. The record reflects that Petitioner did not request a lesser included offense instruction and did not object to the charge on that basis (SF Vol. VIII 446-50). Thus, contrary to Petitioner's allegations, no "refusal" to charge the jury on the

lesser included offense of murder was ever made by the trial court.

CONCLUSION

For these reasons, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

APPENDIX A

vs. - I OF
I
JAMES RONALD MEANES I HARRIS COUNTY, T E X A S

COURT'S CHARGE

MEMBERS OF THE JURY:

Having found the defendant guilty of the offense of capital murder, you will now consider the matter of punishment.

In connection with your consideration of the evidence presented with respect to the question of punishment, I am submitting to you certain issues to be determined by you in accordance with instructions which I shall give you. The state must prove each issue submitted beyond a reasonable doubt, and you shall return a special verdict of "Yes" or "No" on each issue submitted.

You are further instructed that you may not answer any issue "Yes" unless you agree thereon unanimously; and you may not answer any issue "No" unless ten (10) or more jurors agree.

If the jury returns an affirmative finding on each issue submitted below, the Court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted below, the Court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

ISSUE NO. 1

Do you believe from the evidence beyond a reasonable doubt that the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

ANSWER: YES

ISSUE NO. 2

Do you believe from the evidence beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER: YES

Under the instructions herein given, it will not be proper for you, in determining the answers to the foregoing issues, to answer the same by lot, chance, or any system of averages, or any other method than by a full, fair, and free exercise of the opinion of the individual jurors under the evidence submitted to you.

You are not to discuss among yourselves how long the defendant would be required to serve the sentence that may be imposed by the Court. Such matters come within the exclusive jurisdiction of the Board of Pardons and Paroles and the Governor and are no concern of yours.

You are the exclusive judges of the facts proved and the credibility of the witnesses and the weight to be given their testimony, but you are bound to receive the law from the court which has been given you, and you are bound thereby.

JUDGE PRESIDING

FILED
RAY F.
District Clerk
JUL 23 1981
Time 10:45 am
Harris
By

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END OF DOCKET